# STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE

# DOWNTOWN DEVELOPMENT AGREEMENT N.C.G.S. 160A-458.3

THIS DOWNTOWN DEVELOPMENT AGREEMENT made as of this \_]29]\_ day of May, 2003, by and between the CITY OF ASHEVILLE, a North Carolina municipal corporation ("City") and THE GROVE PARK INN RESORT, INC., a Delaware corporation ("GPI").

## WITNESSETH:

**WHEREAS**, the City owns a tract of land approximately one-half ( $\frac{1}{2}$ ) of an acre in size located in the Central Business District which is more particularly described in Exhibit A attached hereto and incorporated herein by reference ("Site #1"); and

**WHEREAS**, GPI and the City have determined that Site #1 would be appropriate for the construction of a mixed use building for retail, office and/or residential purposes, and public amenities, including parking; and

**WHEREAS**, the City owns or has agreed to acquire a tract of land approximately three (3) acres in size located in the Central Business District which is more particularly described in Exhibit A attached hereto and incorporated herein by reference ("Site #2"); and

**WHEREAS**, GPI and the City have determined that "Site #2" would be appropriate for the construction of mixed use buildings for retail, office and/or residential purposes, and public amenities, including parking; and

WHEREAS, the proposed redevelopment of Sites #1 and #2 (the "Project") has been identified as being of major importance to the economic growth and stabilization of the Central Business District of the City, in that the proposed Project will provide a needed linkage between the western anchor of the Central Business District at the Baley Federal Building and the eastern anchor of the Central Business District at the Asheville City Hall; and

WHEREAS, acting pursuant to N.C.G.S. § 160A-458.3, the City Council has found and determined that the Project is likely to have a significant effect on the continued revitalization of the Central Business District of the City in the form of increasing the property tax base of the City and serving as a catalyst for further development in the Downtown area; and

WHEREAS, the Pack Square Conservancy has entered into an agreement dated August 14, 2001, with the City and Buncombe County, ("PSC Agreement"), with respect to an area known as the Pack Square Renaissance Area, which includes Pack Square and City-County Plaza, and the City and GPI propose that the Project will be developed

in all respects in a manner consistent with the PSC Agreement and all guidelines, requirements, designs, approvals, items, and procedures promulgated thereunder; and

**WHEREAS**, the Project would ensure as much as possible the retention of jobs in the City with anticipated expansion of up to 500 additional such jobs; and

WHEREAS, subject to compliance with all applicable statutory requirements and pursuant to N.C.G.S. § 160A-457, the City has determined that it is appropriate to convey Sites #1 and #2 to GPI for commercial use as mixed use buildings, with associated public amenities, including parking; and

**WHEREAS,** the estimated cost of construction of the total Project ranges from Twenty-five Million to Two Hundred Fifty Million Dollars (\$25,000,000 to \$250,000,000); and

**WHEREAS**, the parties desire to set forth their respective responsibilities for the negotiation of further agreements, conveyance of property, development and construction of the Project;

**NOW**, **THEREFORE**, for and in consideration of the premises and the mutual promises and agreements contained herein, the parties hereto do hereby contract and agree as follows:

### 1. Statement of Purpose.

- (a) The City and GPI intend to cooperate in a public/private development project consisting of mixed use buildings on Sites #1 and #2, and associated development of public parking, open space, and infrastructure improvements on adjacent and nearby properties.
- (b) The purpose of this agreement is to formalize the parties' desire to develop Sites #1 and #2, and to establish a framework and critical path schedule for determining the financial and logistical feasibility of the Project, and for the parties to determine their level of participation in the Project.
- (c) GPI shall be primarily responsible for the design of the mixed use buildings, subject to the terms and conditions of this agreement, and other agreements to be negotiated.
- (d) The City shall be primarily responsible for the design of the public amenities, including open space, parking, road and infrastructure improvements, subject to the terms and conditions of this agreement, and other agreements to be negotiated.

Notwithstanding anything to the contrary anywhere within this agreement, (e) other existing agreements, or agreements to be negotiated, where the development or Project contemplated by this agreement comes within the area at any time subject to the PSC Agreement, the parties will abide by the PSC Agreement and all guidelines, requirements, designs, approvals, items, and procedures promulgated thereunder, in all respects, and in the event of a conflict or conflicts between or among the PSC Agreement and the guidelines, requirements, designs, approvals, items, and procedures promulgated thereunder, this agreement, and any other agreements existing or to be negotiated, the PSC Agreement and all guidelines, requirements, designs, approvals, items, and procedures promulgated thereunder shall control. This provision, and other references in this Agreement to the PSC Agreement or the Pack Square Conservancy, are intended as an explicit recognition by the parties of the City's agreement with the the Conservancy, and the City's duties and obligations thereunder; neither this provision nor any other reference in this Agreement to the PSC Agreement or the Conservancy may be construed to make the Conservancy a third party to this agreement, or interpreted to expand the PSC Agreement, or to confer upon the Conservancy any jurisdiction or power beyond what it has pursuant to the PSC Agreement.

# 2. Conveyance of Property for the Mixed Use Buildings.

- (a) Subject to Compliance with N.C.G.S. § 160A-457 and other applicable statutes, the City and GPI shall enter into options to convey a fee simple interest in Sites #1 and #2 to GPI for the construction of the buildings.
- (b) The final description of the properties to be optioned, the monetary or other considerations for said conveyances, and other material terms of said option shall be determined not later than August 1, 2003.
- (c) The City Council will hold a public hearing on the options as required by N.C.G.S. § 160A-457. not later than its regular meeting of \_[August 12]\_, 2003.
- (d) The terms and conditions for said options shall be set forth in separate instruments between the City and GPI, which instruments shall be subject to approval by the City and by GPI. At a minimum, the options will contain the following terms and conditions:
  - (i) The length of the option for Site #1 shall be for 6 months or until September 30, 2003, whichever is longer;
  - (ii) The length of the option for Site #2 shall be for 9 months, or until December 30, 2003, whichever is longer;

- (iii) The option shall permit GPI to enter upon Sites #1 and #2 for the purpose of performing such inspections and tests as may be necessary or desirable for the purpose of determining the feasibility of the proposed construction, and shall provide for soil and subsoil testing, environmental testing, title examination, and other structural and environmental analyses;
- (iv) The options shall provide for renewal or extension with the approval of the City;
- (v) The options shall specify a commercially reasonable consideration, which may be applied against the purchase price;
- (vi) The options shall not be transferable or assignable without the City's consent, which shall not be unreasonably withheld or denied.
- 3. Project Design and Budget. During the option periods, the parties shall engage in negotiations as to the scope and design of the Project, and shall undertake such financial analyses as are necessary to enable them to determine the appropriate scope of the Project and their respective levels of participation. It is anticipated that the private component of the Project will be mixed use buildings and associated parking, and that the public component will be a public parking facility, open space and amenities within the Pack Square/City-County Plaza. These negotiations shall be subject to the following terms and conditions:
  - (a) GPI shall work with the City and the Pack Square Conservancy with respect to the design of the structures proposed for Site #1 and other peripheral and incidental construction work, including any changes to the design, to ensure compliance with the PSC Agreement and any and all guidelines, requirements, designs, approvals, items, and procedures promulgated thereunder. The Public Art Board shall be consulted where appropriate as to matters involving the installation or moving of any works of art or alteration of their context. To the extent that Site #2 within the Pack Square Renaissance Area, this paragraph shall apply to Site #2 as well.
  - (b) GPI will seek proposals for architectural services and construction services for the preparation of plans and specifications and construction of the proposed buildings and associated improvements, including the public components.
  - (c) In developing the preliminary designs, the building to be located on Site #1 will have a maximum of Fifteen (15) stories of occupied space, but may not exceed the Jackson Building in height, as measured from its front entrance. The building to be located on Site #2 will have a maximum of Fifteen (15) stories of occupied space, but may not exceed the City

Building in height as measured from its front entrance. The process for the preparation of the preliminary design will include an opportunity for review and comment by the general public.

- (d) The interior of the buildings shall be subject to approval only by GPI.
- (e) The Project shall be consistent with the design for the Pack Square Renaissance Area, as developed by the Pack Square Conservancy, and shall incorporate elements of said design, where the construction area for the Project overlaps the Pack Square Renaissance Area.
- (f) The preliminary design shall include a public parking facility consisting of at least \_[0]\_ spaces for Site #1, and \_[700]\_ spaces for Site #2.
- (g) The preliminary design shall account for required utility relocations.
- **4.** <u>Construction of the Project</u>. If, following these negotiations, the parties determine to proceed with the development of the Project, the following terms and conditions shall be incorporated into the deeds for Sites #1 and #2 or other instruments, as appropriate, to ensure that their purposes are effectuated:
  - (a) The construction of the buildings on Site #1 and Site #2 shall be commenced on or before the dates specified by agreement of the parties in connection with each respective conveyance.
  - (b) Failure to commence construction by the dates specified, pursuant to paragraph (a) shall subject the affected property to reacquisition by the City. The Deeds from the City to GPI will include conditions subsequent in favor of the City or a reversionary interest in the City, in form and substance reasonably satisfactory to Counsel for the City and GPI to enable the City to effectuate said reacquisition, if necessary.
  - (c) The consideration paid for said reacquisition by the City shall be the stated monetary consideration (if any) as increased by the consumer price index, or \$5,000 per conveyance, whichever is more.
  - (d) Upon commencement of construction, the City will take action to satisfy of record the conditions subsequent or to release any reversionary interests. Commencement of construction shall be defined as the initiation of onsite construction activities pursuant to all necessary permits and approvals.
  - (e) The schedule for the construction of the buildings shall be mutually agreed upon by the City and GPI and to the extent feasible, shall be compatible with the schedule of work to be performed under the PSC Agreement, and

- may be extended if construction is delayed by force majeure or other circumstances which the City determines to be beyond the control of GPI.
- (f) During the course of construction, any Material changes increasing the height, square footage or the exterior appearance of the buildings will require approval by the City Council. For the purposes of the Agreement, the term "Material" shall be defined as Changing the height or the square footage by more than ten (10%) percent; changing the building material or color, and/or changing the amount of fenestration by more than ten (10%) percent on any elevation, provided that any change that results in the maximum limits being exceeded or the minimum limits not being met shall be deemed material.
- (g) GPI, the Architects, and/or the General Contractors will procure all building, environmental, or other permits necessary for the construction and completion of the Project in accordance with the approved plans and specifications. The City shall assist and cooperate with GPI, the Architects and the General Contractors in obtaining any permits.
- (h) The buildings will be constructed in accordance with plans and specifications and contract documents to be negotiated by GPI with the General Contractors.
- (i) GPI shall ensure that the contracts with the General Contractors for the construction of the Project will include provisions to ensure that minority-owned businesses, female-owned businesses, and disabled-owned businesses (as such terms are used in N.C. Gen. Stat. §143-48) shall have a reasonable opportunity to compete for and to perform portions of the work included in the Project and (ii) do not discriminate on the basis of race, color, national origin, sex, age, or disability. Compliance with the City's Minority/Women Business Enterprise Policy, as evidenced by approval of the Buncombe County Office of Minority Affairs, shall be prima facie compliance with this provision.
- (j) To the extent that the Project involves the expenditure of public money, GPI shall ensure compliance with Articles 3C and 8 of Chapter 143 of the N. C. General Statutes, regarding Public Contracts.
- (k) GPI shall be responsible for those improvements that reflect reasonable project impacts on public infrastructure.
- (I) GPI shall not permit any liens or encumbrances to attach to any part of the Project, except as the result of a <u>bona fide</u> dispute with suppliers or contractors, which GPI is contesting pursuant to law or contractual provision. In the event of attachment of any such lien or encumbrance,

- GPI will cause bonds to be posted in an amount sufficient to cause removal of any such liens or encumbrances forthwith.
- (m) GPI shall indemnify and hold the City and PSC harmless from damages for personal injury(including death) or property damage arising during the course of construction of the Project, and shall provide insurance coverage satisfactory to the City's Risk Manager for this purpose. GPI shall also indemnify and hold the City harmless from and against damages arising from GPI's failure to meet its financial obligations under any contract related to the construction of the Project.
- (n) To the extent feasible, any construction schedule shall be devised so as not to disrupt public events such as Bele Chere.
- (o) GPI shall reimburse the City for out-of-pocket expenses related to appraisals and surveys undertaken prior to this agreement *in an amount not to exceed \$10,000.00.*
- (p) GPI shall investigate the extent to which construction or site work might affect the "Energy Loop" sculpture located proximate to Site #1 and determine an appropriate method(s) for protecting said sculpture during the construction phase.
- **5.** Conditions Precedent to GPI's Performance. The obligation of GPI to undertake the construction of the Project is specifically subject to the following conditions:
  - (a) The City and GPI shall have entered into contracts for conveyance of the Sites.
  - (b) The (i) site plan and (ii) exterior design of the buildings shall have been finally approved by the City in the manner provided by law, ordinance or agreement, including the City's agreement with PSC.
  - (c) GPI shall have entered into contracts for the final design and construction of the Project subject to the terms and conditions hereof.
  - (d) GPI shall have determined that there is no environmental contamination on the Sites that would affect the ability of GPI to obtain financing for the Project.
  - (e) It shall have been determined to the reasonable satisfaction of Counsel for GPI that there are no legal restrictions on the property to be conveyed to GPI that would limit the use of the property for the proposed Project.
  - (f) All actions, proceedings, instruments and other documents required, necessary, appropriate or advisable to effectuate the Project, or incidental

thereto, and all other related matters shall have been approved by Counsel for GPI.

# 6. <u>Conditions precedent to City's performance</u>.

- (a) GPI shall have provided evidence satisfactory to the City Council of a commitment for sufficient equity or debt financing for the construction of the Project.
- (b) GPI shall have delivered to the City, in form and substance satisfactory to Counsel for the City, an opinion of Counsel for GPI with regard to the corporate status of GPI, its authority to enter into this Agreement and all contract documents contemplated herein, and the enforceability of all contract documents to which GPI is a party. The opinion also shall state that the execution and delivery of any contract documents contemplated herein will not result in a breach of the terms, conditions or provisions of any contract, agreement or instrument, or order, rule or regulation to which GPI is a party or by which GPI is bound, and that there is no litigation or any governmental administrative proceeding to which GPI is a party that is pending or threatened that would affect the ability of GPI to meet any of its obligations under any of the contract documents contemplated herein.
- **Consideration**. Each option shall contain a separate statement of monetary consideration for Sites #1 and #2, which shall not be less than fair market value. The parties may agree, however, for non-monetary consideration to comprise part or all of the value received for the conveyance of Sites #1 and #2.

#### 8. Termination.

- (a) Upon the failure of GPI to satisfy any of the material terms or conditions of this Agreement, the City shall have the option of terminating the agreements.
- (b) Upon the occurrence of any of the following events, GPI shall have the option of terminating this Agreement:
  - (i) The failure of the City Council to execute options to convey the Sites to GPI.
  - (ii) The failure of the City to satisfy any of the material terms or conditions of this Agreement.
  - (iii) The determination by GPI in its sole discretion, prior to the expiration of the options described in Section 2 thereof, that for any reason the Project or any part of the Project contemplated hereby is not feasible. Prior notification of the determination must be made to

- the City in writing. GPI may terminate this Agreement as to either or both of the Sites described herein. In the event GPI terminates this Agreement as to only one of the two Sites, this Agreement shall continue in effect as it relates to the remaining Site and shall be binding upon the Parties.
- (iv) If GPI terminates this Agreement pursuant to (i) or (ii) above, the City shall reimburse GPI for its documented direct non-construction costs, not to exceed \$5,000 for Site #1, and \$10,000 for Site #2. Payments made by the City under this provision shall be liquidated damages, and GPI shall have no right to legal action for recovery of other or additional costs, and hereby expressly waives same.
- 9. <u>Limited Obligation of City</u>. No provision of this Agreement shall be construed or interpreted as (a) creating a pledge of the faith and credit of the City within the meaning of any North Carolina statutory or Constitutional debt limitation, (b) delegating governmental powers, (c) donating or lending the credit of the City within the meaning of the North Carolina Constitution, (d) obligating the City, directly, indirectly, or contingently, to make any payments beyond those appropriated in the sole discretion of the City Council for any fiscal year, (e) pledging or creating a lien on any class or source of the funds or revenues of the City, or (f) restricting to any extent prohibited by law, any action or right of action on the part of any future governing body of the City. To the extent of any conflict between this paragraph and any other provision of this Agreement, this paragraph shall take priority.
- **10.** <u>Limited Obligation of GPI</u>. No provision of this Agreement shall be construed or interpreted as creating any obligation on the part of GPI to warrant or guarantee any portion of the construction of the Project or the performance of any party other than GPI which may enter into any of the contracts necessary or used to carry out the terms of this Agreement.
- 11. All notices, approvals, consents, requests, or demands or other communications and deliveries required or permitted to be given under this Agreement (i) shall be made in writing, signed by the party making the same and addressed to the address and with the copies as specified below; (ii) shall specify the section of this Agreement pursuant to which it is given; (iii) shall be deemed given if delivered in person, on the date delivered; if sent by telecopier or e-mail, on the date of telephonic or electronic confirmation of receipt; or if mailed first class mail or if mailed as Certified Mail (in each, with postage prepaid), on the date mailed; and (iv) shall be deemed received if delivered in person, on the date of personal delivery; if telecopied, on the date of telephonic confirmation of receipt; or if so mailed, on the third (3rd) business day after being so mailed. Such notice shall not be effective unless copies are provided as specified below, but neither the manner nor the time of giving notice to those to whom copies are to be given need be the same as the addressee and such copies shall not control the date notice is deemed given or received. The addresses and requirements for copies are as follows:

If to the City: City Manager

City of Asheville P.O. Box 7148

Asheville, NC 28802

With copies to: City Attorney

City of Asheville P.O. Box 7148 Asheville, NC 28802

If to GPI: Mr. Craig Madison and Mr. Troy Hunnicutt

Grove Park Inn 290 Macon Avenue Asheville, NC 28804

With copies to: W. Louis Bissette, Jr.

McGuire, Wood & Bissette, P.A.

P.O. Box 3180

Asheville, NC 28802

Or to such other address as any party subsequently shall have designated at any time, or from time to time, by notice given in accordance with this Paragraph 10.

- **12. No Partnership, Joint Venture or Agency**. It is represented, accepted and agreed by the parties, severally, that each is an independent contracting party, is not and shall not become an agent of any other party to this Agreement, except to the limited extent contemplated in Paragraph 3 hereof. Under no circumstances shall the agreement be construed as an instrument of partnership, joint venture, or employment, between, among, or by, any of the parties.
- **13.** Assignment of Agreement. It is mutually agreed by the parties hereto that this Agreement is not transferable by any party without the written consent of the other parties to this agreement, which consents shall not be unreasonably withheld. The above notwithstanding, GPI shall have the right to assign this Agreement to an affiliated entity.
- **14. Entire Agreement**. This Agreement constitutes the entire understanding of the parties with regard to the subject matter hereof.
- **15.** <u>Binding Effect</u>. This Agreement shall be binding upon the heirs, successors, assigns, agents, officials, and employees of the parties.
- **16.** <u>Continuing Obligation</u>. The parties agree to make and execute all further instruments and documents required to carry out the purposes and intent of the agreement.

- **17.** Reference. Use of the masculine includes feminine and neuter, singular includes plural; and captions and headings are inserted for convenience of reference and do not define, describe, extend or limit the scope or intent of this Agreement.
- **18.** <u>Interpretation</u>. All of the terms and conditions contained herein shall be interpreted in accordance with the laws of the State of North Carolina. In the event of a conflict between the various terms and conditions contained herein or between these terms and other applicable provisions, then the more particular shall prevail over the general and the more stringent or higher standard shall prevail over the less stringent or lower standard.

### 19. Other Laws and Regulations.

- (a) GPI will comply with any and all applicable federal, state and local standards, regulations, laws, statutes and ordinances specifically including but not being limited to those regarding toxic, hazardous and solid wastes and any other pollutants; public and private nuisances; health or safety; and zoning, subdivision or other land use controls. GPI will take all reasonable necessary, proper or required safety, preventative and remedial measures in accordance with any and all regulations and directives from the North Carolina Department of Environment, Health and Natural Resources, the United States Environmental Protection Agency, Health Departments, and any other federal state or local agency having jurisdiction, to ensure the prompt prevention or cessation (now or in the future) of violations of either the applicable provisions of such standards, regulations, laws, statutes, and ordinances or any permits or conditions issued thereunder.
- (b) The parties hereto acknowledge that any and all documents related to this transaction are or may be public records pursuant to N.C.G.S. Chapter 132. With respect to GPI's confidential or proprietary information, GPI shall take appropriate steps pursuant to Chapter 132 to designate such information confidential. The City may not be liable to GPI for any release of information relating to this project that is in the City's possession unless such information has been so designated.
- **20.** <u>Amendments</u>. This Agreement shall not be modified or otherwise amended except in writing signed by all of the parties.
- 21. <u>Non-Discrimination</u>. GPI will take affirmative action not to discriminate against any employee or applicant for employment or otherwise illegally deny any person participation in or the benefits of the program which is the subject of this Agreement because of race, creed, color, sex, age, disability or national origin. To the extent applicable, GPI will comply with all provisions of Executive Order No. 11246, the Civil Rights Act of 1964, (P.L. 88-352) and 1968 (P.L. 90-284), and all applicable federal,

state and local laws, ordinances, rules, regulations, orders, instructions, designations and other directives promulgated to prohibit discrimination.

**22.** <u>Survival</u>. All representations, warranties and obligations of the City and GPI herein shall survive the consummation or performance of the various transactions contemplated herein.

IN TESTIMONY WHEREOF, the City, a body politic and corporate, has caused this instrument to be executed in its legal name by its duly authorized Mayor, attested by its City Clerk, and its Official Seal to be affixed hereunto, all by order of the City Council first duly given, and the GPI has caused this instrument to be executed in its respective corporate name, by its President, attested by its Secretary, and its corporate seal to be affixed hereto, all by order of its respective Board of Directors first duly given, all done as of the day and year first above written.

CITY OF ASHEVILLE

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/s/ Magdalen Burleson City Clerk (official seal)	By: <u>/s/ Charles R. Worley</u> Charles R. Worley, Mayor
Attest:	GROVE PARK INN RESORT, INC.
_/s/ John H. Washburn Secretary (corporate seal)	By: <u>/s/ James Craig Madison</u> President
Note to electronic version:	
Notary pages and Exhibit showing building version. Exhibit is available in hard copy for	

Attest:

Approved as to form:	
City Attorney	<del></del>
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STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	
aforesaid certify that Magdalen Burle acknowledged that she is the City Cler municipal corporation, and that by auth	, a Notary Public of the County and State son personally came before me this day and k of the CITY OF ASHEVILLE, a North Carolina ority given and as the act of the corporation, tha name by its Mayor and attested by herself as its
WITNESS my hand and notarial	seal this day of, 2003.
	y Public ommission Expires:
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STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	
that _he is Secretary of GROVE PAR and that by authority duly given and	, a Notary Public, certify that ally came before me this day and acknowledged K INN RESORT, INC., a Delaware corporation as the act of the corporation, the foregoing ts President, sealed with its corporate seal, and
WITNESS my hand and notarial	seal this day of, 2003.
	y Public ommission Expires: